Supreme Court, U.S.
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No. 02-~~111~~ 777

In The

Supreme Court of the United States

LI YU, ADMINISTRATOR OF DECEASED WEI WU'S ESTATE,

Petitioner,

v.

RICK PERRY, IN HIS OFFICIAL CAPACITY ONLY AS THE GOVERNOR OF THE STATE OF TEXAS; DARLENE BYRNE, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS TEXAS STATE COURT JUDGE; JOHN CORNYN, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS TEXAS ATTORNEY GENERAL,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT JUDGE DARLENE BYRNE'S BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Whether the Court of Appeals for the Fifth Circuit had jurisdiction when Petitioner attempted to appeal a non-final, interlocutory order that the district court did not certify as final.

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RESPONDENT JUDGE DARLENE BYRNE'S BRIEF IN OPPOSITION TO CERTIORARI

INTRODUCTION

The Court of Appeals for the Fifth Circuit correctly dismissed Petitioner's attempted appeal of the district court's May 20, 2002 order, which, *inter alia*, granted Respondent Judge Byrne's motion to dismiss. The Fifth Circuit lacked jurisdiction under 28 U.S.C. § 1291 because the district court's order did not constitute a final decision, nor did the order amount to an appealable interlocutory order under 28 U.S.C. § 1292. Finally, the district court did not certify its May 20, 2002 order as final and appealable under Fed. R. Civ. P. 54(b). Accordingly, the circuit court lacked jurisdiction and properly dismissed Petitioner's appeal.

STATEMENT OF THE CASE

Judge Byrne has served as a District Judge in Travis County, Texas since her election in 2000. Judge Byrne conducted official court proceedings in connection with an alleged wrongful death lawsuit filed by Petitioner in Texas state court. In the district court below, Petitioner challenged Judge Byrne's courtroom actions and decisions and also filed constitutional challenges to various Texas statutes.

On May 20, 2002, the district court granted, *inter alia*, Judge Byrne's motion to dismiss. Pet'r App. at c. But the district court's order plainly stated that Petitioner's claims concerning the constitutionality of Texas' Unauthorized Practice of Law statute, pending against Texas Attorney

General John Cornyn[1] in his official capacity, remain to be adjudicated. Pet'r App. at c, p. 8. The district court neither rendered a final decision nor entered a final judgment.

On August 20, 2002, the Court of Appeals for the Fifth Circuit dismissed Petitioner's attempted appeal of the district court's May 20, 2002 order. Pet'r App. at a. Petitioner now seeks certiorari from the Fifth Circuit's order of dismissal and remand to the district court.

REASONS FOR DENYING THE PETITION

I. There Is No Final Judgment In The District Court.

A district court judgment is final if it concludes the case on the merits. *See, e.g., Coopers & Lybrand v. Livesay*, 437 U.S. 463 (1978). The district court's May 20, 2002 order states that the claims against Texas Attorney General John Cornyn regarding the constitutionality of the Texas Unauthorized Practice of Law statute remain to be adjudicated. Pet'r App. at c, p. 8. The district court did not issue a final decision, nor has it entered a final judgment. *See* 28 U.S.C. § 1291. Because there was no final judgment, the Fifth Circuit correctly dismissed Petitioner's appeal unless Petitioner can demonstrate some other jurisdictional basis.

[1] General Cornyn has been elected to the United States Senate and recently assumed those duties upon the resignation of Senator Phil Gramm. Presumably his successor as Attorney General will be joined *sub nomine*.

II. The District Court's Order Is Not An Appealable Interlocutory Order.

Circuit court jurisdiction in appeals stemming from interlocutory orders is governed by 28 U.S.C. § 1292. Specifically, circuit courts have limited jurisdiction over:

> (1) Interlocutory orders . . . granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> (2) Interlocutory orders appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property;
>
> (3) Interlocutory decrees . . . determining the rights and liabilities of the parties to admiralty cases in which appeals from final decrees are allowed.

28 U.S.C. § 1292(a).

Petitioner's case implicates none of these provisions, nor does her petition even attempt to argue that a 28 U.S.C. § 1292 exception applies to the district court's May 20, 2002 order. Thus, the Fifth Circuit's dismissal was correct unless some other jurisdictional provision applies.[2]

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[2] Similarly, this Court's "collateral order" doctrine is inapplicable to the order from which appeal was taken. *See, e.g., Cunningham v. Hamilton County*, 527 U.S. 198, 201-03 (1999).

III. The District Court Did Not Certify Its Interlocutory Order As Appealable.

The Fifth Circuit also lacked jurisdiction because the district court never certified its order as final and appealable under Fed. R. Civ. P. 54(b). The Fifth Circuit, sitting *en banc*, set forth its standard for reviewing Rule 54(b) orders:

> If the language in the order appealed from, either independently or together with related portions of the record referred to in the order reflects the district court's unmistakable intent to enter a partial final judgment under Rule 54(b), nothing else is required to make the order appealable. We do not require the judge to mechanically recite the words "no just reason for delay."

Kelly v. Lee's Old Fashioned Hamburgers, Inc., 908 F.2d 1218, 1220 (5th Cir. 1990) (*en banc*).

Here, the district court's May 20, 2002 order does not constitute an "unmistakable intent to enter a partial final judgment under Rule 54(b)." Instead, the district court dismissed some parties and claims but not all of them. Thus, the Fifth Circuit lacked jurisdiction over Petitioner's appeal and properly dismissed it.

IV. Petitioner Fails To Argue Jurisdiction.

Certiorari should also be denied because Petitioner wholly fails to establish why the Fifth Circuit possessed jurisdiction to determine an appeal of the district court's May 20, 2002 order. Instead, Petitioner merely attempts to argue the merits of her case, without demonstrating

circuit court jurisdiction. For this reason alone, certiorari should be denied.

CONCLUSION

Petitioner fails to accept or acknowledge the cardinal rule of appellate procedure: not every order of a district court is immediately appealable. The May 20, 2002 order from which her appeal stems is not a final order, is not an interlocutory order from which appeal is permitted, nor is it an order to which any other jurisdictional exception applies.

For the foregoing reasons, Judge Byrne respectfully requests that this Court deny the Petition.

Respectfully submitted,

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